

DOCKET FILE COPY ORIGINAL

HENDERSON, BAXTER, TAYLOR & GATCHEL, P.A.

ATTORNEYS AT LAW  
POST OFFICE DRAWER U

607 BROAD STREET  
NEW BERN, NORTH CAROLINA 28563  
www.nctirm.com

B. HUNT BAXTER, JR.  
(1943-2002)

DAVID S. HENDERSON  
BRIAN Z. TAYLOR  
BRIAN J. GATCHEL

RECEIVED & INSPECTED

NOV 29 2002

FCC - MAILROOM

TELEPHONE  
(252) 638-5792

FAX  
(252) 637-7548

EXTENSION 233

November 26, 2002

**VIA FEDERAL EXPRESS** 888-225-5322

**VIA TELECOPIER** 202-418-7361

Ms. Magalie Roman Salas, Sec.  
Federal Communications Commission  
Office of the Secretary  
445-12th Street SW  
12<sup>th</sup> Street Lobby Counter TW-A325  
Washington, DC 20554

RE: Petition for Reconsideration by the FCC for Craven Co. Public School System  
of DA-02-2837  
FCC Docket No. :96-45  
FCC Docket No.: 97-21

Dear Ms. Roman Salas:

Enclosed find an original and four copies of Craven County Public School System's Petition for Reconsideration of the previous decision DA-02-2837, which was released October 28, 2002.

Thank you for your attention to this matter.

Sincerely,

HENDERSON, BAXTER, TAYLOR & GATCHEL, P.A.



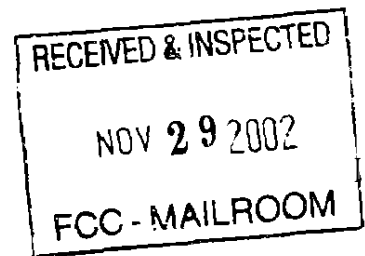
David S. Henderson

DSH/tcm  
Enclosures

No. of Copies rec'd  
List ABCDE

044

Before the  
Federal Communications Commission  
Washington DC 20554



**In the Matter of**

Petition for Reconsideration pursuant to	)	
47 CFR 1.106(f) and for Review and	)	FCC Docket No. 96-45
Reconsideration of DA-02-2837. Release	)	FCC Docket No. 97-21
Date October 28. 2002	)	
	)	

Petitioner: North Carolina Department of Commerce - SIPS  
Craven County Public School System  
Billed Entity Number: 162994  
Application Number: 172952

FRNs	346493	346563
	346910	346979
	347031	347094
	347152	347197
	347252	347387
	347422	347469
	347545	347595
	347967	347998
	348018	348058
	348109	348149
	348182	348226

The Craven County Public School System ("Craven County") of New Bern, North Carolina, respectfully requests a Review and Reconsideration of DA-02-2837, which was released October 28, 2002. The Telecommunications Access Policy Division, Wireline Competition Bureau issued a decision denying Requests for Review filed by the North Carolina Office of Information Technology Services, Raleigh, North Carolina, on behalf of Petitioner herein, Craven County

Petitioner supplements the record in this matter with this Petition and with the State Master Contract with Carolina Telephone & Telegraph Company, d/b/a Sprint Telephone Communication. Annexed hereto is Exhibit A, the addendum of the foregoing master agreement. The Addendum simply fixed the term of the agreement to fifty-four (54) months to coincide with the end of the State's fiscal year and the anticipated award date of a new Master Agreement. Annexed as Exhibit B, please find ITS' internal routing Memo to obtain signatures for the Sprint Addendum

Section 1.106 of the Commission's Rules provides that a Petition for Reconsideration of an Order denying an Application for Review will be entertained only if: 1) the petition relies on facts

which have occurred or circumstances which have changed since the last opportunity to present such matters; or 2) the petition relies on facts unknown to the petitioner until after the last opportunities to present such matters could not, through ordinary diligence, have been learned prior to that opportunity.

Petitioner, N.C. Office of Information Technology Services, Raleigh, NC, filed FCC Form 471 on behalf of Craven County seeking discounts for telecommunication services in Funding Year 2000. SLD denied the funding request after concluding that the FCC Form 471 did not meet the 28-day competitive bidding requirements. Petitioners inadvertently indicated that the contract for services was awarded January 14, 2000, when the State actually signed the contract in 1996. Craven County personnel did not have a full and complete copy of the Master contract with Sprint at the time their Form 471 was filed, nor at the time subsequent appeals were filed.

An appeal was filed with SLD including only a part of the multi-year contract which was signed on or before July 10, 1997. The Master agreement (Sprint Agreement) then in force was a multi-year contract executed in December 1996, therefore exempting the users of that Agreement from the FCC's competitive bidding requirement for the duration of the contract.

The SLD held that Petitioner failed to file FCC Form 470 requesting for month-to-month service and had failed to provide sufficient documentation to show the existence of the contract to the end of Funding Year 2000. Petitioner responded by filing Requests for Review. Petitioner explained that it received telephone service pursuant to the State Master Contract with, Carolina Telephone and Telegraph Company, d/b/a Sprint Telecommunications as the service provider. Petitioners indicated that a contract signed on or before July 10, 1997 is exempt from the competitive bidding requirements for the life of the contract, citing Commissioner's rules in support thereof.

SLD interpreted the Sprint Agreement as having a term of four years, with the Agreement continuing thereafter on a month-to-month basis. SLD's conclusion on this issue was adopted by USAC in DA-02-2837. This conclusion is incorrect in light of applicable North Carolina contract law and public procurement. Petitioner also references the terms of the service agreement, which provide that "[T]his agreement will be automatically renewed and extended on a month to month basis from the referenced termination date unless either party gives written notice to the other of an intention to terminate the agreement." Petitioner maintains that the month-to-month service is not a voluntary extension of the contract but an automatic one.

State contracts are terminable at will, where the will of the State may arise for matters of convenience, appropriation, or procurement. The argument of the SLD and USAC would hold that all State contracts are therefore ineligible by reason that such contracts are neither for definite terms

nor month-to-month, the only elections available on Fonn 470. This conclusion is untenable in context of state procurement laws, state constitutions, and the associated administrative rules governing state procurement.

The school chose to receive telephone services from Sprint under the State Master Contract as permitted by N.C.G.S. §147-33.91, *et. seq.* The school filed its Form 471 (previously provided as an Attachment to its respective **prior** appeal) indicating its election and included several FRNs for voice telephone service. At the time ITS received procurement authority, it sought an amendment to the Sprint contract to **fix** the indefinite term to a fixed term. Because the Petitioner's Form 471 was due at about this same date, the Petitioner did not have the ability to include the information on said Form.

ITS provided the complete Sprint contract addendum, annexed hereto as Exhibit **A**, to the Petitioner for the first time on Wednesday November 20, 2002, after discovering this document among the papers of ITS personnel who do not work in ITS' E-Rate support section. Petitioner's diligence and reliance upon ITS are clear and complete.

Thesecsecond issue relates to the Commission's interpretationofthe State Master Contract with Carolina Telephone and Telegraph Company, d/b/a Sprint Telecommunications. The State Master Contract with Sprint/Carolina Telephone was signed on December 18, 1996 to be effective as a multi-year contract. Under the rules for the E-Rate program, a contract signed on or before July 10, 1997, is exempt from the competitive bid requirements for the life of the contract.

The contract in question (Attachment 3 to the prior appeal) provides in Section 4 that the term of the contract shall be 48 months from the date that service is established. Furthermore, 4(D) of the contract provides:

This Agreement will be automatically renewed and extended on amonth to month basis from the referenced termination date, unless either party gives written notice to the other of an intention to terminate the agreement at the expiration ofthe then current terms. Such notice to be given not less than thirty (30) days prior to the expiration **of** the then current terms.  
[Emphasis added]

Under North Carolina law, where the language ofthe contract is plain and unambiguous, the construction of the agreement is a matter of law; a reviewing court may not ignore or delete any of its provisions, nor insert words into it, but must construe the contract as written, Minor v. Minor, 70 N.C. App. 76, 79, 318 S.E.2d 865, 867, disc. rev. denied, 312 N.C. 495; 322 S.E.2d 558 (1984). Contracts are construed according to the intent of the parties; and in the absence **of** ambiguity, a court construes them by the plain, ordinary and accepted meaning of the language used. Integon

General Ins. Corn. v. Universal Underwriters Ins. Co., 100 N.C. App. 64, 68; 394 S.E.2d 209. 211 (1990). [Emphasis added]

The plain, ordinary and accepted meaning of “automatic” is “largely or wholly involuntary,” Merriam-Webster’s Collegiate Dictionary. This is not the plain, ordinary and accepted meaning of the word “voluntary”. The plain, ordinary and accepted meaning of “voluntary” is proceeding from the will or from one’s own choice or consent. Id.

The contractual term is not a voluntary extension of the contract but an automatic one. The contract continues until someone cancels it. In its denial of the Request For Review, the Wireline Competition Bureau concludes:

“...conversion from a fixed contract term to month-to-month service is a voluntary extension of the contract, regardless of whether such conversion occurs automatically or by request, because month-to-month status leaves the applicant free to **seek** service from another provider at the applicant’s choice. Therefore, under program rules, an FCC Form 470 must be filed each year for discounts on month-to-month service.”

With due regard to the Wireline Competition Bureau, construction of contract law applicable to this question must be resolved in accordance with the laws relating to procurement and public contracting in North Carolina. Review of such laws reveals that such a conclusion is in error. The term conversion is simply a mutual option to terminate. However, so long as performance is rendered, the obligor remains liable; e.g. the State remained obligated to compensate Sprint for services.

**An** option to terminate, if granted, does not specify a term of the agreement. The agreement continues so long as performance occurs, and obligates the purchaser. Curt Teich & Co. v. Lecompte, 222 NC 94, 21 S.E.2d 895 (1942).

At the time of this addendum, ITS was conducting a statewide competitive procurement to replace the Master contracts with ILECs, including Sprint. This effort was scheduled for award not later than 6/30/01; and was, in fact, awarded on June 26, 2001.

It is the position of the Petitioner that the contract was not terminated and remained in effect until terminated. It is further the position of the Petitioner that the contract was properly amended in accordance with North Carolina procurement law and regulations.

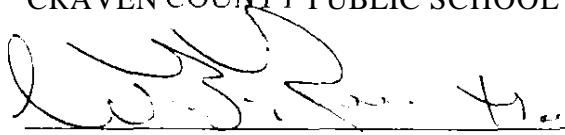
The Petitioner respectfully requests the Commission to reconsider its decision in DA 02-2837, and determine that the contract for Sprint Telephone service was not terminated in December 2000; and thus it remained eligible through its true termination date of June 30, 2001 under FCC regulations.

The Petitioner further requests that the FCC permit it to receive the E-Rate discount for voice telecommunications service from Sprint Telephone service for Program Year 3

Respectfully submitted this the 26 day of November, 2002.

CRAVEN COUNTY PUBLIC SCHOOL SYSTEM


By:



WILLIAM B. RIVENBARK, Superintendent &  
Secretary to the Board of Education

HENDERSON, BAXTER, TAYLOR & GATCHEL,  
P.A., Attorneys for Petitioner, Craven County Public  
School System

By:



David S. Henderson  
State Bar No.: 2016  
607 Broad Street  
Post Office Drawer U  
New Bern, North Carolina 28563  
Telephone: (252) 638-5792  
Facsimile: (252) 637-7548

## SPRINT ADDENDUM



AGREEMENT NUMBER 961218-A

AGREEMENT TERM 6 MONTHSADDENDUM NUMBER 1

WITNESSETH:

Whereas, the parties wish to amend that certain Master Agreement\* ("AGREEMENT") dated December 18, 1996 by and between CAROLINA TELEPHONE AND TELEGRAPH COMPANY (herein "COMPANY") and the State of North Carolina (herein "CUSTOMER").

Now therefore, the parties hereto agree the Agreement is amended as indicated below:

QTY	DESCRIPTION	INSTALLATION CHARGES	MONTHLY RATE	EXTENDED RATE	S&E CODES
1	This extends expiration date	\$ -		\$ -	
	from December, 2000 to	\$ -		\$ -	
	June 30, 2001. All other terms	\$ -			
	and conditions remain the same.			\$ -	
				\$ -	
		\$ -		\$ -	
	SEE ATTACHED ORIGINAL			\$ -	
	MASTER CONTRACT 961218-A			\$ -	
				\$ -	
				\$ -	
				\$ -	
				\$ -	
				\$ -	
				\$ -	
				\$ -	
				\$ -	
				\$ -	

TOTAL INSTALLATION CHARGES \_\_\_\_\_

TOTAL EXTENDED MONTHLY RATE \_\_\_\_\_

\*All Terms and Conditions agreed to on the Master Agreement are hereby agreed to and made a part of this ADDENDUM.

CUSTOMER

Commerce - Information Tech Svcs.

BY: Richard C. Webb-Chief Information Officer

TITLE: Richard C. Webb-Chief Information Officer

DATE: 10-Jan-00

P. D. LaBarbera

COMPANY

CAROLINA TELEPHONE AND TELEGRAPH COMPANY

BY: Hertford T. Smith

TITLE: Director-Business Market Ops

DATE: 2/15/2000

## EXHIBIT B



**North Carolina**  
**Department of Commerce**  
*Telecommunications Services*  
*Office of Information Technology Services*

James B. Hunt Jr., Governor  
Rick Carlisle, Secretary

James W. Broadwell, Director

January 12, 2000

**MEMORANDUM**

**TO:** Rick Webb

**THROUGH:** Ron Hawley  
Jim Broadwell  
Pat LaBarbara *sub*

**FROM:** Jerry Spangler

**SUBJECT:** Signature Required on BellSouth and Sprint Contract Extension Documents for Centrex Service

Two original copies of contract extension documents for centrex service from BellSouth and Sprint are attached that require your signature.

The documents were initiated to extend the **expiration dates** of the original agreements to be coterminous with the end of the fiscal year of the e-rate program as required by the Universal Service Administrative Company, Schools and Libraries Division. All other rates, services, terms, and conditions remain the same as specified in the original agreements. The documents have been marked where your signature is required.

Please return the two signed copies of the addendum to me

Thank you.

***North Carolina. A Better Place To Be***

4110 Mail Service Center • Raleigh, North Carolina 27699-4110  
Tel: (919) 981-5555 • Fax: (919) 850-2827 • State Courier 51-01-11  
An Equal Opportunity/Affirmative Action Employer

